

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER NO. R-30715

**LOUISIANA PUBLIC SERVICE COMMISSION,
EX PARTE**

In re: Adoption and implementation of the Federal Railroad Safety State Participation program in accordance with LA R.S. 45:561 and 562, enacted in the 2008 Legislative Session

(Decided at the Commission's November 12, 2008 Business and Executive Session)

I. Background

a. Introduction

During its 2008 Regular Session, the Louisiana State Legislature passed Act No. 753, enacting R.S. 45:561 and 45:562 relative to the implementation of the Federal Railroad Safety State Participation Program found at 49 CFR Part 212 (the "Program"). The purpose of this rulemaking is to develop the rules and regulations necessary to implement the Program.

Enacted in 1970 and now codified at 49 U.S.C. Chapters 201-213, the Federal Railroad Safety Act allows states to participate in investigative activities under the federal safety law, in return for their loss of direct authority as a result of the express federal preemption over railroad safety to the extent it is regulated by the Federal Railroad Association ("FRA"). Since its inception in 1970, State involvement has been expanded with the promulgation of regulations regarding various inspection fields. There are now thirty (30) states participating in the program¹.

Prior to 1988, states participating in the program could obtain grant funding up to fifty percent (50%) of the cost of personnel, equipment and activities reasonably required to carry out the program. In 1988, Congress eliminated grant funding and has not appropriated federal funds to states participating in the program since that time. States therefore must certify prior to implementing the program that they are able to obtain the necessary funding. In addition to securing funding, states must certify to the FRA that they have jurisdiction over the safety practices of the facilities, equipment, rolling stock, and operations of railroads. States also must employ qualified personnel who are *bona fide* employees of the state agency implementing the Program. And finally, state inspectors must work at least fifty (50) inspection days per year to remain eligible for FRA reimbursement of classroom training costs.

¹ States participating in the program as of 2008 are: Alabama, Arizona, California, Florida, Idaho, Illinois, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington and West Virginia.

Once the above requirements are met, the FRA will provide the required classroom and on the job training. The Louisiana Public Service Commission (“LPSC” or the “Commission”) will be responsible for funding its travel expenditures. The Commission will have the option of leasing FRA-owned laptops for its inspectors, pursuant to a standard agreement developed by the FRA.

b. Louisiana Railroad Statistics

According to FRA statistics regarding railroad accidents other than crossing and trespassing incidents², Louisiana ranks ninth (9th) highest out of all fifty states and the District of Columbia for railroad accidents from years 2004-2007. There were three hundred and seventy (370) total accidents from 2004 to 2007, including one hundred and three (103) in 2004, eighty-six (86) in 2005, ninety-two (92) in 2006, and eighty-nine (89) in 2007.

II. Procedural History

Docket No. R-30715 was published in the Commission’s Official Bulletin dated August 8, 2008, with a fifteen (15) day intervention period. Timely protest and comments were filed by The Louisiana Railroad Association (the “Association”). After the expiration of the intervention period, A Motion for Leave to File Notice of Intervention Out-of-Time and Inclusion on Service List was filed on behalf of Louisiana Chemical Association (“LCA”). Commission Staff granted LCA’s motion on October 23, 2008. Staff issued a Proposed General Order on November 3, 2008, and a Second Proposed General Order on November 10, 2008.

III. Intervenor Comments

The Association’s initial comments raised two issues: 1) state liability; and 2) funding of the program. The Association stated that because of the removal of the concept of “sovereign immunity” from the Louisiana Constitution of 1974, the Program requires inspectors to perform work that may expose the state to liability. The Association further stated that the Commission and/or the State could be found to be joint tortfeasors together with the railroads pursuant to La. Civil Code Article 2324.

The Association also filed comments on Staff’s proposed rule, again citing liability and funding as its main concerns and opposing the Commission’s adoption of Staff’s proposed rule. The LCA did not file any comments.

² Crossing and trespassing incident information is compiled separately and indicates Louisiana ranks sixth (6th) in the total number of crossing and trespassing incidents.

IV. Legal Authority

a. Jurisdiction

i. La. Const. Art. IV § 21

Louisiana Constitution article IV Section 21 paragraph B provides the Commission with the authority to regulate all common carriers and public utilities. It also provides the Commission with “such other regulatory authority as provided by law.” Absent federal preemption, the LPSC has the authority to regulate railroads.

ii. La. R.S. 45:561 and 45:562

Act 753 of the 2008 Louisiana Legislature, effective August 15, 2008, enacted La. R.S. 45:561 and 45:562, which provide additional authority for the Commission to implement the Federal Railroad Safety Act of 1970 and to “issue any rules or orders as permitted by the Federal Railroad State Safety Participation Regulations (49 CFR Part 212).”

La. R.S. 45:562 provides that the Commission may not require a railroad facility owner or operator to alter or cease operations. It further provides that inspections, investigations, and surveillance of a manufacturing facility must be performed in accordance with the facility’s safety regulations, including security clearance to enter the gate.

b. Immunity from Liability

i. U.S. Const. Am. 11

The Eleventh Amendment to the United States Constitution provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.” Although states can waive this sovereign immunity, the LPSC will not be found to have waived its immunity by implementing this program because there is no such waiver provision found therein.

ii. La. R.S. 9:2798.1

Louisiana Revised Statute Title 9 Section 2798.1 provides that “[l]iability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.” This immunity does not extend “[t]o acts or omissions not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or to those which

“constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.”

V. Staff's Findings

Staff finds that the public interest in implementing this program outweighs the risk of any potential exposure to liability of the Commission or the State. While the Association is correct that the Louisiana Constitution of 1974 removed sovereign immunity, other immunity exists under Federal and State law. That is, the Commission is immune from claims in federal court pursuant to the Eleventh Amendment to the United States Constitution, cited above.

Under State law, the LPSC would enjoy a limited form of immunity under La. R.S. 9:2798.1, as stated above, in situations where the Commission or its inspector is acting within its discretionary and/or policymaking authority³.

Staff finds that the railroads should be responsible for paying the fees associated with funding the program. In determining the best method of assessing fees, Commission Staff looked at the methods used by other states as well as Louisiana intrastate rail data including the number of freight railroads, the division among classes, miles operated, and total tons of freight carried.

Of the thirty (30) other states that have implemented the Program, Staff reviewed the methods of assessing fees in twenty-two (22) of those states. Through its review of those fees as well as discussions with FRA personnel, including Region 5, based in Fort Worth, Staff understands that a funding method based on miles of track is better suited for Louisiana than other methods. Staff therefore finds that the Commission assign a percentage of the budget both to Class 1 and Non-Class 1 Railroads. Within each class, each Railroad should contribute in accordance with the number of miles of track.

For fiscal year (FY) 2008-2009, Staff estimates a remaining budget of approximately one hundred thirty-six thousand two hundred thirty-three dollars (\$136,233)⁴, is necessary to fund the program. For FY 2009-2010, Staff estimates approximately four hundred seventy-five thousand dollars (\$475,000.00) is necessary to fund the program. Based on 2006 data⁵, there were a total of three thousand two hundred fifty-two (3252) miles of railroad in Louisiana.

³Commission has inquired into both Region 5, which encompasses Louisiana, as well as individual state managers in other states regarding liability issues and has been assured that neither Region 5 nor any state manager with whom Staff has spoken has experienced inspector liability issues.

⁴ This includes start-up costs and expenses for the remainder of the current fiscal year.

⁵ The Commission has requested updated data from the Association and will update this order as necessary once that information is received.

Staff finds that the best method of assessing fees against the railroads is to assess each railroad that portion of the budget that is equal to its proportionate share of the total miles of railroad in Louisiana.

VI. Staff's Recommendations

Staff recommends that the Commission authorize it to administer the program, including the authority to enter into all necessary agreements with the FRA pursuant to 49 CFR 212. Staff further recommends that the Commission adopt the above recommendation for FY 2008-2009 and FY 2009-2010, reserving for Staff the opportunity to re-evaluate this method of assessing fees upon the request of an interested party or on the Staff's initiative, and if Staff determines that there is a better method for apportioning fees in the future, that the formula be changed accordingly after FY 2009-2010.

Staff recommends that the Commission authorize Staff to select and interview potential inspectors for up to six employees, including a program manager, as is authorized by Act 753.

VII. Commission Consideration

This matter was considered at the November 12, 2008 Business and Executive Session. On Motion of Commissioner Campbell, seconded by Commissioner Manuel, with Commissioners Blossman and Field concurring and Boissiere temporarily absent, the Commission voted to adopt Staff's Second Proposed General Order.

IT IS THEREFORE ORDERED THAT:

1. Commission Staff is authorized to administer Louisiana's participation in the Federal Rail Safety State Participation Program.
2. In conjunction with its administration of the program, Staff is authorized to enter into agreements with the FRA pursuant to 49 CFR Part 212.
3. Commission Staff is further authorized to hire up to 6 employees, including one manager, to implement the Program.
4. As specified below, each and every railroad operating in Louisiana shall pay to the Louisiana Public Service Commission annually, such fee as the Commission finds and determines to be necessary to fund the program for the following year, which shall be that portion of the budget proportionate to each railroad's total miles of railroad in Louisiana.
 - a. For FY 2008-2009, Staff has determined that the remaining necessary budget is one hundred thirty-six thousand, two hundred thirty-three (\$136,233).

- b. For FY 2009-2010, the Commission has determined that the necessary budget is four hundred seventy-five thousand dollars (\$475,000).
 - c. Each railroad shall pay that portion of the yearly budget that is equal to its proportion share of the total miles of railroad in Louisiana.
 - d. The first payment under the program shall be made on or before January 31, 2009. Thereafter, annual payments shall be made on or before July 10.
5. The yearly budget and corresponding amounts due from the railroads will be noticed in each year subsequent to FY 2009-2010 on or before June 1.
6. Should the fees collected pursuant to paragraph number (4), above, prove insufficient to fund the program during the calendar year, Staff is authorized to re-evaluate the manner in which fees are collected, and/or the amount, and re-publish a fee schedule in accordance with its findings.
7. Failure to pay the above fees timely may result in penalties.
8. Staff is further authorized to re-evaluate the method of assessing fees prior to any future assessment either at the request of a party to this rulemaking, or on Staff's own initiative, and revise the formula as necessary to fund the program
9. Commission Staff is authorized to take other legal action necessary to ensure that the state is meeting the objectives of the Federal Program.
10. This order shall be effective immediately.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
November 13, 2008

/S/ JACK "JAY" A. BLOSSMAN
DISTRICT I
CHAIRMAN JACK "JAY" A. BLOSSMAN

/S/ LAMBERT C. BOISSIERE, III
DISTRICT III
VICE CHAIRMAN LAMBERT C. BOISSIERE, III

/S/ JAMES M. FIELD
DISTRICT II
COMMISSIONER JAMES M. FIELD

/S/ FOSTER L. CAMPBELL
DISTRICT V
COMMISSIONER FOSTER L. CAMPBELL

LAWRENCE C. ST. BLANC
SECRETARY

/S/ E. PAT MANUEL
DISTRICT IV